Supreme Court, U.S.
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No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Montana Supreme Court had the authority to act Sua Sponte in deciding that Respondent's Fifth Amendment right against self incrimination had been violated?

2. Whether a probationer's Fifth Amendment right against self incrimination as applied to the states through the Fourteenth Amendment is violated by compelling the probationer, as a condition of a suspended sentence, to admit that he is guilty of the crime for which he has been accused and convicted?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

G. Russell Chambers, 59 U.S. L.W. 4595 (1991) 1

Garrity v. New Jersey, 385 U.S. 493 (1967) 6

Gollaher v. United States, 419 F. 2d 520 (9th Cir. 1969) 5, 6, 7

Poteet v. Feuver, 517 F. 2d 393 (3rd Cir. 1975) 3, 5

State v. Donnelly, 47 St. Rep. 1600, 798 P. 2d 89 (1990) 3, 4

Thomas v. United States, 368 F. 2d 941 (5th Cir. 1966) 1, 3, 4

United States v. Acosta, (5th Cir. 1975) 509 F. 2d 539 4

United States v. Chaidez-Castro, (7th Cir. 1970) 430 F. 2d 766 7

United States v. Garcia, (3rd Cir. 1976) 544 F. 2d 681, 685 4

United States v. Rodriguez, 498 F. 2d 302 (5th Cir. 1974) 5

United States v. Rogers, (5th Cir. 1974), 504 F. 2d 1079 .....4, 7

United States v. Vermeulen, (2nd Cir. 1970) 436 F. 2d 72 7

Wright v. United States, 533 F. 2d 214 (5th Cir. 1976) 6

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case with the exception of one critical point. The Respondent, by raising the issues of vagueness and inequity in its brief on appeal made the Fundamental Fairness Doctrine one of the focal points of the argument.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because the Montana Supreme Court not only has the authority to act *Sua Sponte*, but in following the decision in *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966), the Montana Supreme Court is in agreement with the majority of Federal Courts of Appeal which have addressed this Fifth Amendment issue.

ARGUMENT

1. THE MONTANA SUPREME COURT HAS THE AUTHORITY TO ACT *SUA SPONTE* BECAUSE OF ITS INHERENT POWER.

The Montana Supreme Court, upon reviewing Respondent's brief on appeal found that the issues raised by the Respondent were sufficient for the court to act on its own motion in establishing that his Fifth Amendment right against self incrimination had been violated.

In addressing this issue in *G. Russell Chambers v. Nasco, Inc.*, 59 U.S. L.W. 4595 (1991) the United States Supreme Court stated that:

> "The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

It is clear from this decision that courts have great leeway in the manner in which they may expeditiously dispose of their cases. Therefore, it is the contention of the Respondent that Petitioner's inference in its Writ regarding the lack of authority of the court to act on its own motion is without merit and does not require any additional argument from Respondent.

2. THE PROBATIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT WAS VIOLATED BY COMPELLING HIM, AS A CONDITION OF HIS SUSPENDED SENTENCE, TO ADMIT THAT HE IS GUILTY OF THE CRIME FOR WHICH HE HAD BEEN ACCUSED AND CONVICTED.

The revocation of Respondent's probationary sentence by the District Court effectively augmented his post-conviction sentence because he would not waive his right against self incrimination. At the time of sentencing the court was aware that Respondent continued to maintain his innocence. The court was also aware that in order for the Respondent to comply with the condition contained in the sentencing order, he was required to waive his Fifth Amendment right against self incrimination. Revoking the Respondent's suspended sentence because

of his refusal to waive this right is clearly in conflict with the decision in *Thomas*, supra and the majority of the other Federal Courts which have addressed this issue since the *Thomas* decision.

One of the many Federal Courts which have addressed this issue is the 3rd Circuit Court of Appeal. In *Poteet v. Fauver*, 517 F. 2d 393 (3rd Cir. 1975), the trial court gave the defendant a harsher sentence after a jury had found him guilty because he refused to waive his Fifth Amendment right to maintain his innocence. In reversing the sentence, the Appeals Court concluded that augmentation of a post-conviction sentence based on refusal to admit guilt violated the due process clause of the Fourteenth Amendment of the United States Constitution. This 3rd Circuit decision is a direct result of the 5th Circuit's decision in *Thomas*, supra, which is being relied on by the Respondent.

The Imlay appeal did not present a case of first impression before the Montana Supreme Court. In *State v. Donnelly*, 47 St. Rep. 1600, 798 P.2d 89 (1990) the defendant was found guilty of incest by a jury. The District Court declared the defendant ineligible for parole until the successful completion of the sexual offender program at the Montana State Prison and the subsequent acceptance of the defendant into an aftercare program. An appeal was filed by the defendant. One of the issues raised was that his Fifth Amendment rights had being violated by compelling him to admit his guilt before he could attempt to comply with the condition of the sentencing order.

The Montana Supreme Court in *Donnelly,* supra at page 96, upheld the District Court's decision by ruling that placing a condition on the defendant to complete a sexual offender program in prison before being eligible for parole was not a violation of defendant's Fifth Amendment rights because, "his decision to remain silent was a tactical one, not a compelled one."

It is unclear whether the Montana Supreme Court took *Thomas,* supra, under consideration at the time of making the decision in *Donnelly,* supra. However, from the language in *Imlay* it is apparent that the impact of *Thomas,* supra, along with the decisions in *United States v. Garcia,* (3rd Cir. 1976), 544 F. 2d 681, 685; *United States v. Acosta,* (5th Cir. 1975), 509 F. 2d 539; and *United States v. Rogers,* (5th Cir. 1974), 504 F. 2d 1079, contributed to the Supreme Court to overturn its previous decision in *Donnelly,* supra. In *Imlay,* supra, the court found that the defendant paid a judicially imposed penalty for exercising his constitutional right to maintain his innocence.

In *Imlay,* supra, on page 14a of Petitioner's Writ of the Montana Supreme Court justified its reinterpretation of a defendant's rights under the Fifth Amendment by stating:

"Even though the defendant has already been convicted of the crime that he denies, our system still provides, as noted in the decision, for opportunities to challenge that conviction for example, the defendant still had the right to challenge his conviction, based on a newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered

meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom. Furthermore, while such a defendant would be foreclosed from invoking the protection of such procedure to establish his innocence, the reliability of such admission of guilt under such circumstances would be suspect."

The Montana Supreme Court's reinterpretation of a defendant's Fifth Amendment right against self incrimination is in total agreement with the decision in *United States v. Rodriguez*, 498 F. 2d 302 (5th Cir. 1974), in which the court stated that "A defendant retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his Fifth Amendment rights or risking a harsher sentence."

The Montana Supreme Court, in deciding *Imlay*, realized that the decision of the Ninth Circuit in *Gollaher v. United States*, 419 F. 2d 520 (9th Cir. 1969), and its decision in *Donnelly*, supra, could possibly cause perjury charges to be brought against Respondent once he waives his Fifth Amendment rights, thereby forcing him to provide the rope for his own hanging. In reviewing the decision in *Poteet*, supra, it is clear this court was also concerned about the defendant's ability to defend himself once he has waived his Fifth Amendment rights. The court stated on page 394 that, "Imposition of more severe punishment where a defendant is found guilty following a jury trial, and does not admit his guilt, must be disapproved in that use of such procedure would unduly burden defendant's right to defend."

The Petitioner is asking this court to grant its Petition for Writ of Certiorari by relying mainly on the Ninth Circuit Court of Appeals' decision in *Gollaher,* supra. In this case the defendant was convicted of filing false statements and conspiracy and the court rebuked the defendant for failure to confess crimes for which he was convicted. The court took such failure into consideration in setting sentence. On appeal the Ninth Circuit decided that the defendant's Fifth Amendment right against self incrimination had not been violated because by the defendant's refusal to admit guilt, he was unwilling to take the first step towards rehabilitation. This decision not only destroys the basic rights of the Respondent to maintain his innocence, but such a decision also is contrary to the majority of Federal Courts that have addressed this issue.

The United States Supreme Court in *Garrity v. New Jersey,* 385 U.S. 493 (1967), made it clear that there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. In Respondent's argument against granting Petitioner's Writ it is his position that his Fifth Amendment right against self incrimination is one of these protected rights. Therefore, to permit the lower court to demand a price of such constitutional magnitude from Respondent in exchange for his probationary sentence would clearly be in violation of his Fifth Amendment right against self incrimination.

Petitioner's position of reliance on *Gollaher* was rejected by the Fifth Circuit Court of Appeals in *Wright v. United States,* 533 F. 2d 214 (5th Cir. 1976). In its decision, the court stated on (page 216) that, "A defendant does not

lose his right to appeal or to continue to assert his innocence simply because of a jury verdict of guilty." The court in *Rogers*, supra, on page 1085, went even further in rejecting the Ninth Circuit's decision. The court found that the defendant's Fifth Amendment rights had been violated when he was given a harsher sentence because he refused to waive his right against self incrimination. The court stated that, "We think that this result is mandated by Fifth Amendment considerations and we therefore decline to align ourselves with the differing views expressed in *United States v. Vermeulen*, (2nd Cir. 1970) 436 F. 2d 72; *United States v. Chaidez-Castro* (7th Cir. 1970) 430 F. 2d 766; and *Gollaher v. United States* (9th Cir. 1969)."

CONCLUSION

For the reasons presented above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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